A **GOVERNMENT OF THE STATE OF SARAWAK**

v.

LAH ANYIE & ORS

B COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
TENGKU MAIMUN JCA
HAMID SULTAN ABU BACKER JCA
[CIVIL APPEAL NO: Q-01-254-10]
C 1 APRIL 2013

ADMINISTRATIVE LAW: *Exercise of administrative powers - Legitimate expectation - Claim for native customary rights over land - Basis for invocation of jurisprudence relating to legitimate expectation -*
D *Whether rights recognised under law - Whether doctrine of legitimate expectation applicable*

LAND LAW: *Customary land - Right to - Claim for native customary rights over land - Whether issue of NCR in accordance with customary law - Whether land fell under definition of "reserved land" - Whether*
E *NCR could be created over reserved land - Whether NCR could only be created over Interior Area Land - Whether permit to create NCR obtained - Whether NCR contravened Forest Ordinances - Land Code (Sarawak Cap 81), ss. 2, 5(1), 10(3)*

F ***NATIVE LAW AND CUSTOM:*** *Land dispute - Customary rights over land - Claim for - Whether issue of NCR in accordance with customary law - NCR purportedly acquired from Berawan community - Whether Berawan community had NCR rights over land - Whether NCR could be transferred from one community to another*

G

NATIVE LAW AND CUSTOM: *Land dispute - Customary rights over land - Claim for - Whether issue of NCR in accordance with customary law - Whether land fell under definition of "reserved land" - Whether NCR could be created over reserved land - Whether NCR could*
H *only be created over Interior Area Land - Whether permit to create NCR obtained - Whether NCR contravened Forest Ordinances - Land Code (Sarawak Cap 81), ss. 2, 5(1), 10(3)*

I The respondents/plaintiffs' action was to seek declarations to assert their native customary rights ('NCR') claims against the defendants. The plaintiffs who belonged to the Kayan/Kenyah communities acquired the purported NCR over the disputed land in the year 1964. The plaintiffs were permitted by the Berawan

community to settle in the claimed area and had subsequently obtained a tacit approval to occupy, pursuant to a letter dated 27 January 1969 from the District Officer, Baram. The learned trial judge held that the plaintiffs had lawfully acquired NCR over the claimed area. Hence, the appeal by the defendants. The issues to be considered by the court were: (i) whether the learned trial judge erred in law and in fact in finding and declaring that the land claimed by the plaintiffs under NCR is "native customary land"; (ii) whether native customary rights could subsist in the land claimed by the plaintiffs under NCR upon the said land becoming part of the Bok-Tisam Protected Forest ('BTPF') or Reserved Land; (iii) whether the learned trial judge erred in law and in fact in holding that it would be unjust and unconscionable to the respondents/plaintiffs to allow the plaintiffs to rely upon the protected forest and the provisions of the Forest Ordinance to defeat the plaintiff's claim or to deny them the legitimate expectation that they would be allowed to live, occupy and cultivate the land; (iv) whether the plaintiffs acquired NCR over land; and (v) whether NCR could subsist in the land claimed under NCR upon it becoming part of Forest Reserve.

Held (allowing appeals with costs)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) It is well settled in accordance with s. 5(1) of the Land Code of Sarawak ('Land Code') that the issue of NCR must be in accordance with the customary law of the community concerned and the land must be an Interior Area Land. There must also be a permit issued under s. 10(3) of the Land Code. In the instant case, the claimed land fell under the BTPF and was so proclaimed under the Lands Ordinance of Sarawak in 1951. The BTPF comes within the definition of "Reserved Land" under s. 2 of the Land Code. By virtue of s. 5(1), NCR land can only be created after 1 January 1958 over the Interior Area Land which cannot include Reserved Land like the BTPF. Since the claimed area fell within the BTPF, no NCR could be created after 1 January 1958 over the claimed area which was undisputedly Reserved Land and not Interior Area Land. (para 15)

(2) The plaintiffs had also never proved that they had obtained any permit under s. 10(3) of the Land Code to create NCR over the claimed area. Such permit can only be issued over Interior Area Land. (para 15)

(3) No permit, licence or authority pursuant to s. 33 of the Forests Ordinance 1934 and s. 36 of the Forest Ordinance 1953 from the Conservator/Director of Forests, creating the rights for the Berawans and the plaintiffs within the BTPF, had been adduced in evidence at the High Court. Therefore, any alleged rights created would have been in contravention of the express provisions of the said Forest Ordinances and should not be enforced by declaratory orders from the court. (para 16)

(4) Based on the official records, there was no evidence that the Berawans had any NCR rights within the BTPF prior to 1964 when they purportedly "gave" their NCR land within the BTPF to the plaintiffs. Hence, the decision by the learned judge, that even though the land claimed was untitled State Land *albeit* within the BTPF and therefore NCR could still subsist, could not be sustained both on law and in fact. (para 16)

(5) It is well settled that NCR cannot be transferred from one community to another or even within the same community unless the custom allows for it. There was no evidence of any Berawan custom which entitled the community to "give" away their NCR land to another totally different community/ communities. In any event, the very nature of native customary tenure over land requires the natives to be in continuous occupation of their land and characterised their unique connection and attachment to their ancestral land. (paras 6 & 16)

(6) The doctrine of legitimate expectation cannot create a right when such right does not exist but may give some form of limited relief to the litigant if there is some unfairness or conduct which led the litigant to suffer inconvenience or damages. To entail the litigant to obtain the relief, it must be pleaded in the right perspective and cannot be claimed based on a purported right which the law does not recognise under s. 5 of the Land Code. The fact that the government

authorities had conducted themselves in a manner to support the plaintiffs' claim could not be a basis in law to invoke the jurisprudence relating to legitimate expectation to assert a right which the law does not recognise. (paras 21 & 22)

Bahasa Malaysia *Translation Of Headnotes*

Tindakan responden-responden/plaintif-plaintif adalah untuk memohon deklarasi untuk mengesahkan tuntutan hak adat anak negeri ('HAAN') terhadap defendan-defendan. Plaintif-plaintif yang terdiri daripada suku kaum Kayan/Kenyah memperoleh HAAN yang dinyatakan terhadap tanah yang dipertikaikan tersebut pada tahun 1964. Plaintif-plaintif dibenarkan oleh suku kaum Berawan untuk menduduki kawasan yang dituntut dan kemudian telah memperoleh kelulusan tersirat untuk menduduki, menerusi sepucuk surat yang bertarikh 27 Januari 1969 daripada Pegawai Daerah, Baram. Yang arif hakim bicara memutuskan bahawa plaintif-plaintif telah memperoleh HAAN yang sah terhadap kawasan yang dituntut. Maka rayuan ini oleh defendan-defendan. Isu-isu yang perlu dipertimbangkan oleh mahkamah adalah: (i) sama ada yang arif hakim terkhilaf dari segi undang-undang dan fakta dalam dapatan dan pengisytiharan bahawa tanah tersebut yang dituntut oleh plaintif-plaintif di bawah HAAN adalah "tanah adat anak negeri"; (ii) sama ada hak adat anak negeri boleh kekal dalam tanah yang dituntut oleh plaintif-plaintif di bawah HAAN selepas tanah tersebut dijadikan sebahagian dari Hutan Simpanan Bok Tisam ('HSBT') atau Tanah Rezab; (iii) sama ada yang arif hakim terkhilaf dari segi undang-undang dan fakta dalam memutuskan bahawa adalah tidak adil dan tidak berpatutan bagi plaintif-plaintif untuk membenarkan plaintif-plaintif bergantung kepada Hutan Simpanan dan peruntukan Ordinan Hutan untuk menyangkal tuntutan plaintif-plaintif atau menafikan mereka harapan yang sah bahawa mereka akan dibenarkan menetap, menduduki dan mengusahakan tanah tersebut; (iv) sama ada plaintif-plaintif memperoleh HAAN terhadap tanah tersebut; dan (v) sama ada HAAN boleh kekal dalam tanah yang dituntut di bawah HAAN selepas ia menjadi sebahagian dari Hutan Simpanan.

Diputuskan (membenarkan rayuan-rayuan dengan kos)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Adalah matan bahawa berikutan s. 5(1) Kanun Tanah Sarawak ('Kanun'), pemberian HAAN mestilah menurut undang-undang adat suku kaum yang terlibat dan tanah tersebut mestilah

A Tanah Kawasan Pedalaman. Juga, perlu ada permit yang dikeluarkan di bawah s. 10(3) Kanun. Dalam kes ini, tanah yang dituntut terangkum di bawah HSBT dan telah diisytiharkan sedemikian di bawah Ordinan Tanah Sarawak pada tahun 1951. HSBT terangkum dalam tafsiran "Tanah
B Rezab" di bawah s. 2 Kanun. Berikutan s. 5(1), tanah HAAN hanya boleh dibentuk selepas 1 Januari 1958 ke atas Tanah Kawasan Pedalaman yang tidak termasuk Tanah Rezab seperti HSBT. Oleh sebab kawasan yang dituntut terangkum dalam HSBT, HAAN tidak boleh dibentuk selepas 1 Januari 1958
C terhadap kawasan yang dituntut yang tidak dipertikaikan adalah Tanah Rezab dan bukan Tanah Kawasan Pedalaman.

(2) Plaintif-plaintif juga tidak membuktikan bahawa mereka telah memperoleh apa-apa permit di bawah s. 10(3) Kanun untuk
D membentuk HAAN terhadap kawasan yang dituntut. Permit sedemikian hanya boleh diberikan terhadap Tanah Kawasan Pedalaman.

(3) Tidak ada permit, lesen atau kuasa berdasarkan s. 33 Ordinan Hutan 1934 dan s. 36 Ordinan Hutan 1953 daripada
E Konservator/Pengarah Perhutanan, membentuk hak-hak bagi suku kaum Berawan dan plaintif-plaintif dalam HSBT, yang dikemukakan sebagai keterangan di Mahkamah Tinggi. Oleh itu, apa-apa dakwaan hak yang dibentuk adalah bertentangan
F dengan peruntukan langsung Ordinan Hutan tersebut dan tidak sepatutnya dikuatkuasakan oleh perintah deklarasi dari mahkamah.

(4) Berdasarkan kepada rekod rasmi, tidak ada keterangan bahawa suku kaum Berawan mempunyai apa-apa hak HAAN dalam
G HSBT tersebut sebelum tahun 1964 apabila mereka dikatakan "memberikan" tanah HAAN mereka dalam HSBT kepada plaintif-plaintif. Oleh itu, keputusan yang arif hakim, bahawa walaupun tanah yang dituntut tersebut adalah Tanah Negeri yang tidak bermilik meskipun dalam HSBT dan dengan itu
H HAAN masih dimiliki, tidak boleh dipertahankan di sisi undang-undang dan fakta.

(5) Adalah matan bahawa HAAN tidak boleh dipindah milik daripada satu suku kaum kepada satu suku kaum yang lain
I mahupun di antara suku kaum itu sendiri kecuali adat membenarkannya. Tidak ada keterangan bahawa mana-mana adat suku kaum Berawan yang memberikan hak kepada suku

kaum tersebut "memberikan" tanah HAAN mereka kepada satu suku kaum yang ternyata berlainan. Walau apapun, sifat pemegangan adat anak negeri terhadap tanah memerlukan anak negeri menetap secara berterusan di tanah mereka dan memberikan gambaran kaitan dan kesetiaan unik mereka kepada tanah pusaka mereka.

(6) Doktrin harapan sah tidak boleh membentuk suatu hak apabila hak sedemikian tidak wujud, tetapi boleh memberikan suatu bentuk relif terhad kepada pelitigasi jika terdapat ketidakadilan atau tindakan yang mengakibatkan pelitigasi mengalami kesusahan dan kerugian. Untuk memerlukan pelitigasi memperoleh relif tersebut, ia mesti diplidkan dalam perspektif yang betul dan tidak boleh dituntut berdasarkan kepada hak yang dimaksudkan yang tidak diiktiraf di sisi undang-undang di bawah s. 5 Kanun. Fakta bahawa pihak berkuasa kerajaan telah menonjolkan diri mereka sebagai menyokong tuntutan pihak plaintif tidak boleh dijadikan asas undang-undang untuk membangkitkan jurisprudens berkaitan dengan harapan sah untuk menegaskan hak yang tidak diiktiraf oleh undang-undang.

Case(s) referred to:

A-G of Hong Kong v. Ng Yuen Shiu [1983] 2 All ER 346 ***(refd)***

Ara Aman & Ors v. Superintendent of Lands and Mines, 2nd Div [1973] 1 LNS 5 HC ***(refd)***

Bisi Jinggot @ Hilarion Bisi Jenggut v. Superintendent of Lands and Survey Kuching Division & Ors [2012] 1 LNS 260 CA ***(refd)***

Bisi Jinggot v. Superintendent of Lands and Survey Kuching Division & Ors [2008] 5 CLJ 606 HC ***(refd)***

Boo Are Ngor v. Chua Mee Liang [2008] 4 CLJ 533 CA ***(refd)***

Chor Phaik Har & Ors v. Choong Lye Hock Estates Sdn Bhd & Ors [1996] 4 CLJ 141 CA ***(refd)***

Darahman Ibrahim & Ors v. Majlis Mesyuarat Kerajaan Negeri Perlis & Ors [2008] 4 CLJ 538 CA ***(refd)***

Ghaziabad Development Authority v. Delhi Auto & General Finance Pvt Ltd [1994] 4 SCC 42 ***(refd)***

Hamit Matusin v. Superintendent of Lands and Surveys & Anor [2001] 6 CLJ 303 HC ***(refd)***

Hamit Matusin & Ors v. Superintendent of Lands & Surveys & Anor [1991] 2 CLJ 1524; [1991] 2 CLJ (Rep) 677 HC ***(refd)***

John Peter Berthelsen v. Director-General of Immigration, Malaysia & Ors [1986] 2 CLJ 409; [1986] CLJ (Rep) 160 SC ***(refd)***

Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v. Director General of Trade Unions & 3 Ors [1990] 2 ILR 97 HC ***(refd)***

A *Madeli Salleh v. Superintendent of Lands & Surveys & Anor [2005] 3 CLJ 697 CA* ***(refd)***
North East Plantations Sdn Bhd v. Pentadbir Tanah Daerah Dungun & Anor [2011] 2 CLJ 392 CA ***(refd)***
R v. Secretary of State for the Home Department, ex p Ruddock [1987] 2 All ER 518 ***(refd)***
B *R v. Secretary of State for Transport ex p. Richmond upon Thames London BC [1994] 1 All ER 577* ***(refd)***
Schmidt v. Secretary of State for Home Affairs [1969] 2 Ch 149 ***(refd)***
Sia Siew Hong & Ors v. Lim Gin Chian & Anor [1996] 3 CLJ 26 CA ***(refd)***
C *Sidek Hj Muhamad & Ors v. The Government of the State of Perak & Ors [1982] CLJ 244; [1982] CLJ (Rep) 321 FC* ***(refd)***
Union of India v. Hindustan Development Corp AIR 1994 SC 988 ***(refd)***

Legislation referred to:
Forests Ordinance (Cap 31) 1934, ss. 33, 36
D Land Code (Sarawak Cap 81), ss. 2, 5(1), (2)(f), 10(3), 38, 44, 209(1), (2)

Other source(s) referred to:
De Smith's Judicial Review, 6th edn, pp 609, 612, 613

E *For the appellant - JC Fong (Talat Mahmood Abdul Rashid & Lonie Pinda with him); Sarawak AG's Chambers*
For the respondent - Harisson Ngau (Kalveet Sandhu with him); M/s Sandhu & Co

F *[Appeal from High Court, Miri; Suit No: 22-59-97 (MR)]*

Reported by S Barathi

JUDGMENT

G **Hamid Sultan Abu Backer JCA:**

[1] Three appeals relating to native customary rights (NCR) in Sarawak came for hearing on 4 February 2013 and on the same day we allowed the appeals. My learned brother Abdul Wahab Patail JCA and sister Tengku Maimun binti Tuan Mat JCA have
H read the draft judgment and approved the same.

[2] The respondents/plaintiffs' action was to seek declarations to assert their NCR claims against the defendants. The learned trial judge found in favour of the plaintiffs' claim. Each and every
I defendant has filed a separate appeal and is represented by three firms of solicitor's and or advocates. For easy reference the parties will be referred to as plaintiffs, first, second and third defendant as per the suit.

[3] The third defendant, the Government of the State of Sarawak, has filed appeal No: Q-01-254-10 and the second defendant has filled appeal No: Q-02-1373-2010 and the first defendant has filed appeal No: Q-02-1372-2010. All parties agree for the purpose of disposing all the three appeals, it will be sufficient to deal with the third defendant's appeal and the plaintiffs have filed one submission to cover all the three appeals substantially responding to the third defendant's submission.

[4] The learned State Legal Counsel Datuk JC Fong for the third defendant in this appeal says:

(a) The declaration that the respondents/plaintiffs have native customary rights over the claimed area ought to be set aside;

(b) The consequential declarations that the issuance of the provisional leases by the appellants infringed or impaired their NCR and violates the Federal Constitution should be set aside;

(c) The award of damages premised upon the respondents having lawfully created or acquired NCR over the claimed area and that there was no extinguishment of their purported NCR, be set aside;

(d) *In lieu* thereof, there should be an order that the claimed area was state land and that neither do the respondents have any, nor any legitimate expectation to be granted, proprietary interests over the claimed area, that the respondents were in unlawful occupation of state land under s. 209(1) read with sub-s. (2) of the Land Code.

(e) Alternatively, for the reasons mentioned in para. 6.2 the court ought not to, grant the declarations sought by the respondents.

[5] At the outset we must say that as from 1 January 1958 NCR may be created as set out in s. 5 of Land Code of Sarawak (LCS) 1957. The said s. 5 reads as follows:

> 5(1) As from the 1st day of January, 1958, native customary rights may be created in accordance with the native customary law of the community or communities concerned by any of the methods specified in subsection (2), if a permit is obtained under section 10, upon Interior Area Land. Save as aforesaid, but

A without prejudice to the provisions hereinafter contained in respect of Native Communal Reserves and rights of way, no recognition shall be given to any native customary rights over any land in Sarawak created after the 1st day of January, 1958, and if the land is state land any person in occupation thereof shall be deemed to be in unlawful occupation of state land and section 209 B shall apply thereto.

(2) The methods by which native customary rights may be acquired are:

C (a) the felling of virgin jungle and the occupation of the land thereby cleared;

(b) the planting of land with fruit trees;

(c) the occupation or cultivation of land;

D (d) the use of land for a burial ground or shrine; or

(e) the use of land of any class for right or way; or

(f) any other lawful method:

E Provided that:

(i) until a document of title has been issued in respect thereof, such land shall continue to be state land and any native lawfully in occupation thereof shall be deemed to hold by licence from the Government and shall not be required to F pay any rent in respect thereof unless and until the document of tile is issued to him; and

(ii) the question whether any such right has been acquired or has been lost or extinguished shall, save in so far as this code makes contrary provision, be determine by law in force G immediately prior to the 1st day of January, 1958.

[6] It is also well settled native customary rights cannot be transferred from one community to another unless the custom allows. And even within the same community transfer of NCR land H is only permissible if allowed by the customs of the natives. (See *Hamit Matusin & Ors v. Superintendent of Lands & Surveys & Anor* [1991] 2 CLJ 1524; [1991] 2 CLJ (Rep) 677). In *Bisi Jinggot v. Superintendent of Lands and Survey Kuching Division & Ors* [2008] 5 CLJ 606, Hamid Sultan JC as he then was had this to say:

I

> *Madeli (supra)* was a case which was dealing with a native Malay who claimed NCR on the grounds that many years prior to 1 January 1958, his father and later himself, had acquired and

> exercised NCR over the disputed land by clearing the land, occupying the land and planting rubber and fruit trees on the land. In this case, the plaintiff is not alleging that his ancestors were in continuous occupation of the land. On the contrary he says that he has purchased the NCR by way of ordinary sale and purchase agreement. I do not think NCR can be transferred by modern conveyancing instrument of transfer as it could not have been *prima facie* part of the NCR and/or practice. I agree with the submissions of the first and second defendants that NCR in Sarawak can only be transferred in a limited sense for example by gift or inheritance etc, within the community members of the native before any claimant can be showered with the exclusive privileges. That is to say, *inter alia*, a native from a community residing in south of Sarawak cannot purchase NCR from a native in a community residing in north of Sarawak. The nexus must be within the community and not within the race. For courts to recognise any such transfers it must be legislated. It is not sufficient for the plaintiff to allege such transfers are in vogue and is recognized in practice, without satisfactory evidence adduced in court. The burden of proof lies with the plaintiff and that burden has not been discharged in this case according to law.

[7] The above decision was upheld by the Court of Appeal and is reported as *Bisi Jinggot @ Hilarion Bisi Jenggut v. Superintendent of Lands and Survey Kuching Division & Ors* [2012] 1 LNS 260 which reads as follows:

> From the above, it is clear to us that in the light of what had been decided by the Native Court, this court is legally bound to take judicial notice of the customary law that have been clearly and consistently established by the aforementioned judgment of the Native Court of Appeal in Sarawak with the bottom line that individual customary rights created or acquired by natives through the practice of their customs cannot be transferred for value or to someone from outside their community or district.
>
> There is, however, one other interesting and pertinent point raised in the submission of the parties that merits consideration by this court. It is whether this court has jurisdiction to change native customary law in order to be in abreast with the changing of time and the reality of the situation so as to avoid injustice, unreasonableness and oppression.
>
> In this regard our attention is also drawn to art. 121 of the Federal Constitution which provides *inter alia* that "the High Courts and inferior courts shall have such jurisdiction as may be conferred by or under federal law".

A We are also referred to Items 2(a) and (b) of List II (State List) of the Ninth Schedule of the Federal Constitution and Item 13 of List IIA (Supplement to State List for States of Sabah and Sarawak) read with art. 74(2) and 95B(1)(a) of the same. By virtue of these provisions, only the State Legislature of Sarawak can legislate on (a) Native Reservations and Land Tenure, and (b) Native Law and Customs, including *inter alia*, the determination of native law and customs.

In the light of the above, it is our view that we are unable to consider the appellant's proposition that the court has the power to change native customary law. The power lies with the State Legislature of Sarawak.

[8] In the instant case it is not in dispute that the plaintiffs who belong to the Kayan/Kenyah communities acquired purported NCR over the disputed land in the year 1964. And the plaintiffs were permitted by the Berawan community to settle in the claimed area. And the District Officer, Baram has given tacit approval by a letter dated 27 January 1969 for the plaintiffs to occupy and the said letter *inter alia* reads:

... Kerana sabelom kita pindah ka Long Teran, kita sudah beri chukup terang dengan orang2 Long Jegan dan Penghulu Lejau dan semua dia orang sudah berstuju.

Oleh sebab tiada ada halangan dari pehak orang yang mempunyie tanah, Penghulu dan lain2 saya pun bersetuju juga minta tinggal di-sana sahaja.

[9] Based on the letter it is also the argument of the plaintiffs that the doctrine of legitimate expectation will assist them to sustain their claim. We must say here that the doctrine of legitimate expectation has everything to do with procedural fairness and when it is raised to anchor a substantive right it only assists to give a fair hearing and proper sanction against authorities by way of damages for loss or damages suffered by the litigant in reliance of the representation made by the authorities. One or two passages from the learned authors of *De Smith's Judicial Review,* 6th edn. pp. 609, 612 and 613 will stand as a useful guide. The relevant passages *inter alia* read as follows:

Since the early 1970s one of the principles justifying the imposition of both procedural and substantive protection has been the legitimate expectation. Such an expectation arises where a decision-maker has led someone affected by the decision to believe

> that he will receive or retain a benefit or advantage (including that a hearing will be held before a decision is taken). It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires regularity, predictability, and certainty in government's dealings with the public. ...
>
> When considering the procedural, as opposed to substantive aspects of the legitimate expectation, the promise or representation or conduct which creates the expectation will only require that the person receive a fair hearing. The expectation therefore extends only to the opportunity to make representations or to any other component of a fair hearing, for example, the duty to give reasons. Once the duty to give the hearing has been fulfilled there is not necessarily any further duty to provide the actual substance of the expectation. From the mid 1980s the English courts began to uphold the protection of substantive expectations under limited conditions. ...

[10] Support for the above proposition is found in a number of cases. To name a few are as follows:

(i) In *R v. Secretary of State for Transport ex p Richmond upon Thames London BC* [1994] 1 All ER 577 at p. 595, the court stated:

> I consider that the putative distinction between procedural and substantive rights in this context has little (if any) utility: the question is always whether the discipline of fairness, imposed by the common law, ought to prevent the public authority respondent from acting as it proposes.

(ii) In *R v. Secretary of State for the Home Department, ex p Ruddock* [1987] 2 All ER 518, Taylor J said at p. 531, that:

> The doctrine of legitimate expectation in essence imposes a duty to act fairly. Whilst most of the cases are concerned, as Lord Roskill said, with a right to be heard, I do not think the doctrine is confined. Indeed, in a case where '*ex hypothesi*' there is no right to be heard, it may be thought the more important to fair dealing that a promise or undertaking given by a minister as to how he will proceed should be kept. Of course such promise or undertaking must not conflict with his statutory duty or his duty, as here, in the exercise of a prerogative power.

A (iii) In *A-G of Hong Kong v. Ng Yuen Shiu* [1983] 2 All ER 346 at p. 351, Lord Fraser said:

> When a public authority has promised to follow a certain procedure, it is in the interests of good administration that it should act and should implement its promise, so long as implementation does not interfere with its statutory duty.

B

[11] The learned trial judge's findings and decision which the defendants complain of can be gleaned from the judgment which reads as follows:

C

> ... Thus I accepted the submissions that the plaintiffs led by their Ketua Kampong Oyong Anyi Avit has moved or migrated ("bulak" or pindah) to the claimed area in accordance with adat or custom of the Kayan and Kenyah; and with the agreement or permission of the Berawans (Kenyah) of Kampong Long Jegan; the community Chiefs of the area ie the Penghulu and Councillor of the area; and also with the agreement or permission of the District Officer Baram, the plaintiffs could therefore lawfully acquired NCR over the claimed area (which includes the overlapping area of Lot 3 and Lot 8 therein).

D

E

[12] Learned counsel for the third defendant has summarised the issue for consideration for this court as follows:

(a) Whether the learned trial judge erred in law and in fact in finding and declaring that the land claimed by the plaintiffs under NCR is "native customary land?"

F

(b) Whether native customary rights could subsist in the land claimed by the respondents/plaintiffs under NCR upon the said land becoming part of the Bok-Tisam Protected Forest or Reserved Land?

G

(c) Whether the learned trial judge erred in law and in fact in holding that it would be unjust and unconscionable to the respondents/plaintiffs to allow the plaintiffs to rely upon the protected forest and the provisions of the forest ordinance to defeat the plaintiff's claim or to deny them the legitimate expectation that they would be allowed to live, occupy and cultivate the land.

H

(d) Whether plaintiffs acquired native customary rights over land?

I

(e) Whether NCR could subsist in the land claimed under NCR upon it becoming part of forest reserve?

[13] Learned counsel's submission for the plaintiffs on the issue whether the plaintiffs acquired NCR over the land is simple and straight forward. It can be summarised as follows: A

(a) The plaintiffs' claim is not founded upon the creation of native customary after 1 January 1958 although they moved into the area in 1964. Their claim is based upon acquisition of temuda rights of Berawans (a sub-race of Kenyahs) who had created and were exercising such rights; B

(b) The correct approach is to ask the questions: (1) whether the Berawans had native customary rights in the subject land; and (2) whether the plaintiffs lawfully acquired native customary rights from them sometime in 1964. In this regard, it is to be noted that s. 5(2)(f) of the Land Code (Cap. 81) provided that native customary rights may be acquired by "any lawful method". The acquisition of rights in accordance with native custom or adat will fall within this method. C D

[14] Learned counsel for the plaintiffs had proceeded to justify the trial judges' finding and conclusion in detail in their submission. We find it unnecessary to set out the arguments which we have considered in detail for reasons stated below. E

[15] We have read the relevant appeal records and the submission of the parties in detail. We thank the counsel for the comprehensive submission. We do not wish to repeat the same save to deal with the core issues. After having given much consideration to the entire submission of the plaintiffs, we take the view that appeal must be allowed. Our reasons *inter alia* are as follows: F G

(a) It is well settled in accordance with s. 5(1) of the Land Code:

(i) On the issue of NCR as per the instant case, it must be in accordance with the customary law of the community concerned; H

(ii) The land must be Interior Area Land;

(iii) There must be a permit issued under s. 10(3) of the Land Code. I

(b) In *Madeli Salleh v. Superintendent of Lands & Surveys & Anor* [2005] 3 CLJ 697; [2005] 5 MLJ 305, Clement Skinner J (as he then was) sitting in the Court of Appeal had this to say:

> As can be seen, after January 1, 1958, no recognition is given to any native customary rights created after the date by any of the methods mentioned in the s. 5 unless a permit to do so under s. 10 of the Land Code is obtained.

(c) The claimed land falls under the Bok Tisam Protected Forest (BTPF) and was so proclaimed under the Lands Ordinance of Sarawak in 1951 which proclamation the learned judge agrees is valid. But goes to say "that being so, it does not mean the plaintiffs cannot have NCR claim over the area within BTPF". We do not think so and we are in agreement with submission of learned counsel for the third defendant which can be summarised as follows:

(i) The BTPF comes within the definition of 'Reserved Land'. Section 2 of the Land Code defines "Reserved Land" as:

(a) reserved to the government under s. 38 or under the corresponding section of any Ordinance repealed by this Code;

(b) comprised within a National Park constituted under the National Parks and Nature Reserves Ordinance 1998 or within a Forest Reserve, Protected Forest or Communal Forest constituted under the Forests Ordinance;

(c) occupied otherwise than under a document of title by the Federal or State Government or by any department or official capacity of either such government; or

(d) otherwise lawfully constituted or declared to be reserved land.

(ii) Interior Area Land is also defined in s. 2 of the Land Code as land 'not falling within the definition of Reserved Land, Native Customary Land, Native Area Land or Mixed Zone Land'. By reason of this statutory definition of Interior Area Land, land classified as Native Customary Land cannot be Interior Area Land.

(iii) Therefore, by virtue of s. 5(1), NCR land can only be created after 1 January 1958 over the Interior Area Land which cannot include reserved land like the BTPF. Since the claimed area falls within the BTPF, no NCR can be created after 1 January 1958 over the claimed area which is undisputedly Reserved Land and not Interior Area Land. It is settled law that no NCR can be created over land categorised as Reserved Land. (See (i) *Ara Aman & Ors v. Superintendent of Lands and Mines, 2nd Div* [1973] 1 LNS 5; [1975] 1 MLJ 208; (ii) *Hamit Matusin v. Superintendent of Lands and Surveys & Anor* [2001] 6 CLJ 303).

(iv) The plaintiffs never proved that they had obtained any permit under s. 10(3) of the Land Code to create NCR over the claimed area. Such a permit can only be issued over Interior Area Land.

(d) We are also of the view that on the factual matrix of the case the learned judge erred when he held that:

> It must be remembered that Bok Tisam Forest may be declared as BTPF; it is still State Land. And it must be remembered that under section 5(2) Sarawak Land Code NCR can subsists over State land where no proprietary title has been issued.

[16] On this issue we are also in agreement with the submission of learned counsel for the third defendant which can be summarised as follows:

(a) For s. 5(2) to apply, there must be evidence that NCR (which must be those of the Berawans) in the claimed area within the BTPF subsisted before 1 January 1951. But there is no evidence from the Berawans that they had NCR over any part of the BTPF prior to 1 January 1958.

(b) In so far as the respondents are concerned, there is no dispute that they came to the Long Teran by the Batang Tinjar, after 1964 ie after s. 5 of the Land Code came into force. Accordingly, the respondents must show that their rights were created in accordance with s. 5(1) and (2) of the Land Code. The land must not only be untitled state land but must be interior area land and the Berawans had a permit issued to them under s. 10 of the Land Code.

(c) Besides, the prohibitions imposed by s. 33 of the Forests Ordinance, 1934 and by s. 36 (as applicable until it was amended in 1996) of the Forest Ordinance 1953, would have made it illegal for the Berawans and the respondents to create rights within the BTPF by clearing and land therein for farming or cutting timber or taking forest produce without a permit or authority from the conservator/director of Forests. No such permit, licence or authority had been adduced in evidence at the High Court. Therefore, any alleged right created would have been in contravention of the express provisions of the said forest ordinances and should not be enforced by declaratory orders from the court.

(d) Accordingly, the learned judge concluded that even though the land claimed was untitled state land *albeit* within the BTPF and therefore, NCR could still subsist, could not be sustained both on law and in fact.

(e) Based on official records there is no evidence that the Berawans had any NCR rights within the BTPF prior to 1964 when they purportedly "give" their NCR land within the BTPF to the respondents.

(f) Further, there is no evidence of any Berawan custom which entitles that community will "give" away their NCR land (assuming without admitting the Berawans had such alleged NCR) to another totally different community/communities.

(g) In any event, the very nature of native customary tenure over land requires the natives to be in continuous occupation of their land and characterised their unique connection and attachment to their ancestral land. Dr. Ramy Bulan and Amy Lockyear in their book *Legal Perspectives on Native Customary Land Rights in Sarawak,* wrote:

> The land tenure customs of the Kelabit, Iban and Penan are an integral part of their community structure ... The customs underpin the native occupation of their lands, their territorial domains and their connection to their ancestral land.

[17] The defendants also complain that it was clearly wrong for the learned judge to invoke the jurisprudence of legitimate expectation to provide relief that too to recognise NCR rights on the basis that the state has consented to the plaintiffs occupying the disputed land. That part of the judgment *inter alia* reads as follows:

In this case the facts clearly established and support the plaintiffs' contentions of having legitimate expectation that they shall be allowed to continue to leave, occupy, use and cultivate the land in the claimed area including the overlapping area of Lot 3 and Lot 8 therein.

[18] And learned counsel for the third defendant on this issue submits as follows:

Since the respondents had not established even on a balance of probability that the Berawans (a sub group of the Kenyahs race) had NCR over the claimed area and that the respondents only moved into the claimed area after the meeting held on 15 February 1964, and the said claimed area was either reserved land or not interior area land; no NCR could have been created after 1 January 1958 without a permit issued under s. 10(3) of the Land Code. On the basis of these undisputed facts, the respondents could not have any legitimate expectation that "legitimate expectation "to be issued a document of title in respect of the said native customary land" as pleaded in para. 8(a) of the Re-Amended Statement of Claim.

[19] Learned counsel for the plaintiffs asserts that the doctrine of estoppels and/or legitimate expectation is applicable in the instant case and submits as follows:

The learned trial Judge found that the doctrine of estoppels was available to answer the defendant's defence. He held that it would be unjust, inequitable and unconscionable to allow the defendants to rely upon the constitution of the Bok-Tisam Protected Forest to defeat the plaintiffs' claim and to deny them the right and legitimate expectation of being allowed to live in occupy and cultivate the land.

In coming to the above conclusion, the learned trial judge accepted the plaintiffs' submission founded on a mass of undisputed evidence which established:

Their migration to the land claimed by them in accordance with the adat or "bulak" was with the tacit approval/ agreement of the District Officer Baram;

They had paid rates for amenities provided by local council;

They had received agricultural subsidies for the planting of pepper, rubber and cocoa from the authorities who had also built a primary school, a health clinic and piped water supply for the area;

A When the plaintiffs' longhouse was destroyed in a fire, the defendants had rendered assistance for building of the present longhouse;

The natural Resources and Environmental Board (BREB) accepted and approved the recommendation in the EIA
B Report that the plaintiffs be allowed to continue to live and form within the claimed area and which contained the recommendation "To the local farmers who have been forming and living in the area for generations, and who are in genuine need of land these is a moral responsibility on
C the part of the government to ensure that they have sufficient land to cultivate ..."

The second respondent has opted to sign the Letter of Undertaking (exh. P18) to comply with conditions set by NREB or recommendations made by EIA Report.

D In coming to the above conclusion the learned trial judge sought guidance from various case law authorities, namely:

Sia Siew Hong & Ors v. Lim Gin Chian & Anor [1996] 3 CLJ 26; [1995] 3 MLJ 141

E *Chor Phaik Har & Ors v. Choong Lye Hock Estates Sdn Bhd & Ors* [1996] 4 CLJ 141

Boo Are Ngor v. Chua Mee Liang [2008] 4 CLJ 533

F **[20]** We must say the doctrine of legitimate expectation in the recent years is being widely used in cases other than purely relating to administrative law. For example, in *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch 149 Lord Denning MR was of the view that the ambit of natural justice extended not merely
G to protect rights but any legitimate expectation of which it would not be fair to deprive a person without hearing what he has to say. In *Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v. Director General of Trade Unions & 3 Ors* [1990] 2 ILR 97; [1990] 3 MLJ 231, Justice Edgar Joseph Jr traced the concept of
H legitimate expectation and opined that it has been evolved by the court to assist in identifying interests which do not constitute rights in the strict sense but nevertheless deserve legal recognition in the context of legal expectation. His Lordship asserted that it was in *Schmidt* that Lord Denning first applied this concept which
I was recognised by our Supreme Court in *JP Berthelesen*. (See *John Peter Berthelsen v. Director-General of Immigration Malaysia & Ors*

[1986] 2 CLJ 409; [1986] CLJ (Rep) 160; [1987] 1 MLJ 233). In *Union of India v. Hindustan Development Corp AIR* 1994 SC 988, the Indian Supreme Court recognised the jurisprudence that the doctrine of 'legitimate expectation' imposes in essence a duty on public authority to act fairly by taking into consideration all relevant factors relating to 'legitimate expectation'. In *Ghaziabad Development Authority v. Delhi Auto & General Finance Pvt Ltd* [1994] 4 SCC 42, the Indian Supreme Court was of the view that the plea of legitimate expectation relates to procedural fairness in decision-making and forms part of the rule of non-arbitrariness, and it is not meant to confer an independent right enforceable by itself.

[21] What is important to note in all the above cases is simply that the doctrine of legitimate expectation cannot create a right when such right does not exist but may give some form of limited relief to the litigant if there is some unfairness or conduct which led the litigant to suffer inconvenience or damages.

[22] To entail the litigant to obtain the relief, it must be pleaded in the right perspective and cannot be claimed based on a purported right which the law does not recognise under s. 5 of SLC. The fact that the government authorities have conducted themselves in a manner to support the plaintiffs' claim cannot be a basis in law to invoke the jurisprudence relating to legitimate expectation to assert a right which the law does not recognise. More so when s. 44 SLC specifically states:

> No person shall acquire any right or title against the government by virtue of any adverse possession, unlawful occupation or occupation under temporary licence, and no right or title shall be acquired against the government, such right or title as may be lawfully granted under this Code.

[23] Support for the above proposition is also found in a number of cases. In *North East Plantations Sdn Bhd v. Pentadbir Tanah Daerah Dungun & Anor* [2011] 2 CLJ 392, Abu Samah JCA, delivering the majority judgment of the Court of Appeal, held:

> In our judgment, legitimate expectation cannot override the express statutory provisions of the Code.

(See *Sidek Hj Muhamad & Ors v. The Government of the State of Perak & Ors* [1982] CLJ 244; [1982] CLJ (Rep) 321; *Darahman Ibrahim & Ors v. Majlis Mesyuarat Kerajaan Negeri Perlis & Ors* [2008] 4 CLJ 538).

[24] For reasons stated above, we take the view that all the three appeals must be allowed with costs. The order of the High Court must be set aside. The plaintiffs to pay each defendant costs in the sum of RM5,000.

We hereby order so.